

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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date: July 5, 2007

to: Brenda Dial
Director
(Campus Compliance Services)

from: Gary D. Gray
Deputy Associate Chief Counsel, Enforcement
(Procedure & Administration)

subject: Advice regarding Section 6304(b)(4) and Answering Machine Messages

This memorandum responds to your request dated January 8, 2007, and addresses the issues raised by our March 26, 2007, memorandum. This advice may not be used or cited as precedent.

ISSUES

1. Whether an employee of the Service attempting to reach a taxpayer by telephone in connection with collection of a tax may identify himself as a Service employee in a message left on an answering machine if the employee is not reasonably certain that the answering machine is the taxpayer's.
2. Whether an employee of the Service attempting to reach a taxpayer by telephone in connection with collection of a tax may identify himself as a Service employee to a person answering the phone whose identity is not known.

CONCLUSIONS

1. If a Service employee attempting to reach a taxpayer by telephone in connection with collection of a tax cannot be reasonably certain that the answering machine is the taxpayer's, the employee should leave no message at all.
2. A Service employee attempting to reach a taxpayer by telephone in connection with collection of a tax generally may disclose to the unknown person that he is a Service employee only if he is asked to identify his employer.

PMTA : 00918

FACTS

You have asked us to revisit issues addressed in advice given to your office on February 28, 2000, concerning situations in which a Service employee attempts to contact a taxpayer by telephone, but does not reach the taxpayer. You stated that, historically, when a Service employee identified himself as an employee of the Service, the taxpayer response rate was 30%, and, based on a recent study, when the Service employee did not reveal that he worked for the Service, the taxpayer response rate dipped to 9.5%. In our discussion on April 30, 2007, you stated that the historical 30% response rate represented the Service's experience before I.R.C. § 6304 was enacted and that the 9.5% response rate in your request represents ACS experience since then.

LAW AND ANALYSIS

In 1998, Congress enacted two taxpayer protection provisions that apply to the questions you have raised. Sections 7602(c) and 6304 impose certain procedural and substantive limitations on Service communications in connection with tax collection. These provisions were an outgrowth of provisions enacted by Congress in 1977 as part of the Fair Debt Collection Practices Act (FDCPA) to protect consumers from private debt collectors – businesses hired by creditors to collect delinquent debts.

The FDCPA limits debt collector contacts with third parties in connection with collection of a prejudgment debt to contacts seeking information about the debtor's location, unless otherwise authorized by the debtor or a court. 15 U.S.C. § 1692c(b). When seeking location information the debt collector must identify himself, state that he is seeking location information and, only if asked by the third party, identify his employer. He may not state that the debtor owes a debt. 15 U.S.C. § 1692b.

Section 7602(c) reflects a modified version of FDCPA principles regarding communications with third parties. Section 7602(c)(1), which governs the Service's third-party contacts in connection with the determination or collection of a tax, adopts the general rule that Service employees may not contact persons other than the taxpayer absent certain conditions. Like the FDCPA, section 7602(c) permits the Service to contact a person other than the taxpayer if authorized by the taxpayer. I.R.C. § 7602(c)(3)(A). But Congress recognized that the Service, unlike debt collectors working on behalf of private creditors, has tax enforcement responsibilities that often require it to make third-party contacts in order to obtain information necessary to determine or collect a taxpayer's federal tax debts. Section 7602(c) does not limit third-party contacts to contacts authorized by the taxpayer or efforts to obtain location information. The Service is permitted to make third-party contacts after notifying the taxpayer that such contacts may be made. I.R.C. § 7602(c)(1). And after giving such notice, the Service is not limited to asking for location information. Moreover, the Service may disclose tax return information to third parties as necessary for investigative purposes. I.R.C. § 6103(k)(6).

Section 6304(b) imposes on the Service the FDCPA requirement contained in 15 U.S.C. § 1692d(6) to meaningfully disclose the caller's identity when placing telephone calls in connection with the collection of a debt. I.R.C. § 6304(b)(4). It also contains the exception applicable when the caller seeks "location information" concerning the debtor. 15 U.S.C. § 1692b(1)-(2).

The requirement of "meaningful disclosure" of identity in section 6304(b)(4) is not defined in the Code or discussed in its legislative history, and there are no applicable Treasury regulations. The meaningful disclosure requirement is understood in cases construing the FDCPA to require identification of the caller's employer. Hosseinzadeh v. M.R.S. Associates, Inc., 387 F.Supp.2d 1104, 1112 (C.D. Cal. 2005); Foti v. NCO Financial Systems, Inc., 424 F.Supp.2d 643, 654-660 (S.D.N.Y. 2006). But when an employee of a debt collector seeks location information, he may only identify himself and state that he is trying to locate the debtor. He may not identify his employer unless asked. 15 U.S.C. § 1692b(1).

While "location information" is defined in the FDCPA as "a consumer's place of abode and his telephone number at such place, or his place of employment," 15 U.S.C. § 1692a(7), the location information exception necessarily covers contacts with intermediaries (e.g., receptionists or other unknown persons who answer the phone) in order to bring the taxpayer to the phone. Except to obtain location information, debt collectors may only speak with third parties in connection with collection of a prejudgment debt if authorized by the debtor or a court. 15 U.S.C. § 1692c(b). Debt collectors who rely on the location information exception to speak with a third party may not seek information about the debtor that goes beyond items that are narrowly intended to help the debt collector contact the debtor.

Courts have applied the FDCPA requirement of meaningful disclosure of identity and the location information exception to situations involving answering machines. When the message is left on an answering machine at the debtor's residence, district courts have concluded that employees of a private debt collector must identify their employer to satisfy the requirement of meaningful disclosure and must provide the FDCPA's so-called mini-Miranda warnings.¹ See Hosseinzadeh, 387 F.Supp.2d at 1112 and 1116 (FDCPA's requirements were violated when the employee failed to disclose his employer's identity and the nature of the business in answering machine messages left at debtor's residence); Foti v. NCO Financial Systems, Inc., 424 F.Supp.2d at 654-660 (following Hosseinzadeh in the same circumstances); Joseph v. J.J. MacIntyre Companies, LLC, 281 F.Supp. 2d 1156, 1162-1164 (N.D. Cal. 2003) (court rejects argument that debt collector was justified in not disclosing the agency's identity because the messages might have been heard by third parties with access to the answering machine; risk of disclosure to a third party was unlikely on an answering machine at the debtor's residence).

¹ The mini-Miranda warning refers to the FDCPA's requirement that a debt collector disclose to the debtor that the debt collector is trying to collect a debt and that information obtained from the debtor will be used for that purpose. 15 U.S.C. § 1692e(11). Congress did not adopt a similar requirement for Service employees.

The Foti court rejected the similar argument that the provisions of the FDCPA presented a "Hobson's choice" when a debt collector encountered an answering machine. The Foti court responded that the choice was only presented if the debt collector chose to leave an answering machine message, which under the FDCPA the debt collector could safely choose not to do. On the other hand, the court noted that a debt collector could leave a message identifying both the debt collector employee and his employer on an answering machine if the debt collector reasonably believed it to be at the phone number of the debtor's residence or a phone number otherwise closely identified with the debtor so that the risk of inadvertently disseminating information regarding debt collection efforts to third parties was minimal. Foti, 424 F.Supp.2d at 658-660.

If a Service employee who is attempting to reach a taxpayer in connection with collection of a tax reasonably believes he has reached the taxpayer's answering machine and chooses to leave a message, he should state his name, his telephone number, any appropriate reference number for the inquiry, and that he works for the Service, but should not provide other information regarding the nature of the call unless the taxpayer has previously authorized him to leave such information on the answering machine. As an added precaution, the Service may wish to have its employees introduce their messages by a warning similar to warnings used by some private debt collectors:

Thank you for allowing us to leave a message. This is a private message for [taxpayer's name]. If this is not [taxpayer's name], please disconnect or hang up now. [Pause two seconds]. This is a private message for [taxpayer's name].

If the Service employee does not have a reasonable belief he has reached the taxpayer's answering machine, he should not leave a message. A Service employee may reasonably believe he has reached the taxpayer's answering machine if the greeting on the answering machine refers to the taxpayer's name or if the taxpayer has previously indicated that this is a telephone number at which he may be directly reached.²

If a Service employee who is attempting to contact the taxpayer in connection with the collection of the taxpayer's taxes reaches a third person or a person who refuses to identify himself, the employee should not reveal that he is employed by the Service unless asked to identify his employer. As discussed above, the location information exception to the meaningful disclosure requirement prevents a Service employee, who

² There may be circumstances in which a Service employee's belief that he has reached the taxpayer's answering machine may not be reasonable, even if the answering machine refers to the taxpayer's name in the greeting. For example, the taxpayer may have a common name and there is little other information tending to confirm that the phone number dialed is the taxpayer's number, or the information relied on to confirm the phone number may be stale. [REDACTED]

is seeking to locate the taxpayer, from identifying his employer unless expressly asked to do so.

Please call William Spatz or me at (202) 622-3400 if you have any further questions.